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9 **UNITED STATES DISTRICT COURT IN AND FOR**  
10 **THE NORTHERN DISTRICT OF CALIFORNIA**

11 HOUTAN PETROLEUM, INC.

12 Plaintiff,

13 vs.

14 CONOCOPHILLIPS COMPANY, a  
15 Texas Corporation and DOES 1  
16 through 10, Inclusive

Defendants.

CASE NO. 07-CV-5627 SC

**[PROPOSED] FINDINGS OF FACT AND  
CONCLUSIONS OF LAW GRANTING  
PLAINTIFF'S APPLICATION FOR  
PRELIMINARY INJUNCTION AND  
ORDER**

[After hearing on the record on November 16,  
2007]

17 TO DEFENDANT, CONOCOPHILLIPS COMPANY AND TO ITS ATTORNEY OF  
18 RECORD:

19 On November 16, 2007, the Order to Show Cause re: Plaintiff, Houtan Petroleum,  
20 Inc.'s, application for Preliminary Injunction came regularly for hearing before the United  
21 States District Court for the Northern District of California, before the Honorable Samuel  
22 Conti presiding. The parties appeared through their counsel of record.

23 The Court has duly considered the Complaint on file herein, the moving papers, the  
24 responding papers, the reply papers, the declarations submitted by the parties and the evidence  
25 submitted therewith and after a hearing on the record, makes the following Findings of Fact  
26 and Conclusions of Law Re: Preliminary Injunction.

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Findings of Fact

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2           1.     Plaintiff, Houtan Petroleum, Inc., is a ConocoPhillips Company franchisee that  
3 operates the Union 76 branded gasoline station franchise located at 101 E. El Camino Real,  
4 Mountain View, California 94040 (the "Station"). (Haddad declaration, ¶2).

5           2.     Plaintiff operates its franchise pursuant to a franchise agreement with  
6 ConocoPhillips, with an existing expiration date of August 31, 2010. (Haddad declaration,  
7 ¶4, Exhibit A).

8           3.     On September 18, 2007, Defendant forwarded a Notice of Termination to  
9 Plaintiff, deeming the franchise agreement to be terminated effective October 31, 2007.  
10 (Haddad declaration, ¶6, Exhibit B).

11          4.     This Notice of Termination was provided less than 90 days prior to the effective  
12 date of termination.

13          5.     On October 18, 2007, Plaintiff notified Defendant of its intention to acquire  
14 possession of the property, immediately upon Defendant's loss of its right to grant possession  
15 and requested that Defendant tender a *bona fide* offer for the sale of its equipment and  
16 improvements at the Station. (Haddad declaration, ¶9, Exhibit D).

17          6.     On October 22, 2007, Defendant made an offer to sell its equipment and  
18 improvements at the station for \$340,000.00. (Haddad declaration, ¶10, Exhibit E).

19          7.     Effective, November 1, 2007, Plaintiff acquired possession through a lease  
20 entered into with the landlord of the property on which the Station is located. (Haddad  
21 declaration, ¶8, Exhibit C).

22          8.     Plaintiff contends that the termination failed to comply with the Petroleum  
23 Marketing Practices Act ("PMPA"), 15 U.S.C. §2801, et seq. because the Notice of  
24 Termination was made less than 90 days prior to the effective date of termination and because  
25 Defendant's offer to sell its equipment and improvements was not *bona fide* because it  
26 exceeded and failed to approach fair market value, based on Plaintiff's approximate 20 years  
27 of experience as an operator of over fifteen gasoline station over the years. (Haddad  
28 declaration, ¶¶ 21, 22).



1           9.     On November 5, 2007, Plaintiff initiated the underlying action and filed an ex  
2     parte application for temporary restraining order and preliminary injunction under the PMPA  
3     §2801, et seq., seeking to enjoin Defendant from terminating its franchise relationship with  
4     Plaintiff and compelling Defendant to continue to supply Plaintiff with motor fuel pursuant  
5     to its franchise agreement. This Court granted said Application for Temporary Restraining  
6     Order on November 6, 2007 by separate order and set an Order to Show Cause Re:  
7     Preliminary Injunction for hearing on November 16, 2007.

8           10.    Defendant has filed papers in response to the Order to Show Cause and has  
9     opposed Plaintiff's application for Preliminary Injunction on the grounds that it was not  
10    required to provide Plaintiff with 90 days notice of termination, that it did provide Plaintiff  
11    with 90 days notice of termination and that its offer to Plaintiff was *bona fide* because it did  
12    approach fair market value.

13          11.    According to Defendant, it was not required to provide Plaintiff with 90 days  
14    notice of termination because it would not have been reasonable for it to do so under the  
15    circumstances explained in its response papers.

16          12.    According to Defendant, it did provide Plaintiff with 90 days notice of  
17    termination because of a disclosure contained in the franchise agreement that Plaintiff signed  
18    more than 90 days prior to the effective date of termination.

19          13.    According to Defendant, its offer approached fair market value based on an  
20    appraisal that it had obtained from a licensed third-party appraiser.

21                               Conclusions of Law

22          14.    The Court has jurisdiction of this action pursuant to the provisions of the  
23    Petroleum Marketing Practices Act, 15 U.S.C. Section 2805.

24          15.    "Congress enacted the Petroleum Marketing Practices Act to protect franchisees  
25    from arbitrary or discriminatory termination or non-renewal of their franchises." *Khorenian*  
26    *v. Union Oil Co.* 761 F.2d 533, 535 (9<sup>th</sup> Cir. 1985) (Internal quotations omitted).

27          16.    Courts have "recognized that as remedial legislation, the Act must be given a  
28    liberal construction consistent with its goal of protecting franchisees." *Id.* (Internal quotations

1 omitted).

2 17. The "PMPA prohibits termination or nonrenewal of a franchise except for  
3 specifically enumerated reasons and upon the franchisor's compliance with the [PMPA's]  
4 notice requirements." *Khorenian*, 761 F.2d at 535.

5 18. The PMPA is intended to protect gas station franchise owners from arbitrary  
6 and discriminatory termination or nonrenewal of their franchises with large oil corporations  
7 and gasoline distributors, and to remedy the disparity in bargaining power between the parties  
8 to gasoline franchise contracts. *DuFresne's Auto Service, Inc. v. Shell Oil Company*, 992  
9 F.2d 920, 925 (9<sup>th</sup> Cir. 1993) and *Mobil Oil Corporation v. Virginia Gasoline Marketers and*  
10 *Automotive Repair Association*, 34 F.3d 220, 223 (4<sup>th</sup> Cir. 1994).

11 19. Section 2804 of the PMPA requires that in order for termination or nonrenewal of  
12 a franchise to be valid, the franchisor must give the franchise notice of such termination not  
13 less than 90 days prior to the date on which such termination or nonrenewal takes effect,  
14 unless it would not be reasonable to do so under the circumstances.

15 20. Courts construe the PMPA notice requirements strictly. *Pruitt v. New Eng.*  
16 *Petroleum L.P.*, 2006 U.S. Dist. LEXIS 85961 (D. Conn. 2006) (citing, *Ceraso*, 326 F.3d at  
17 314 and *Escobar v. Mobil Oil Corp.*, 678 F.2d 398, 400 n.2 (2d Cir. 1982); see also, *Davy v.*  
18 *Murphy Oil*, 488 F. Supp. 1013, 1016 (W.D.Mich.1980) (Failure to comply with the notice  
19 provision, even if the defect is only a minor or technical one, is grounds to enjoin the  
20 termination or nonrenewal of the franchise relationship). Additionally, it is the franchisor  
21 who bears the burden of proving that its notice of termination complies with the PMPA.  
22 *Pruitt v. New Eng. Petroleum L.P.*, *supra*, (citing 15 U.S.C. § 2805©)).

23 21. The 90-days notice requirement is an important provision of the PMPA and  
24 should not be lightly excused. *Oparaocha v. Sun Co.*, 3 F. Supp. 2d 4, 7 (D.D.C. 1998)  
25 (citing, *Wisser Co., Inc. v. Mobil Oil Corp.*, 730 F.2d 54 (2d Cir. 1984)); see also, *Zipper v.*  
26 *Sun Co., Inc.* 947 F. Supp. 62, 68 (E.D.N.Y. 1996) (finding less than 90-days notice to be  
27 invalid in a situation where franchisee was delinquent in paying the franchisor for money that  
28 was allegedly due) (quoting, *Wisser Co., Inc. v. Mobil Oil Corp.*, 730 F.2d 54, 60 (2d Cir.



1 1984)). In fact, the 90-days notice is so important that failure to comply with the requirement  
2 can show a "willful disregard" of the PMPA so as to warrant imposition of exemplary  
3 damages. *See e.g., Oparaocha v. Sun Co., supra.*

4 22. Thus where a franchisor improperly terminates a plaintiff's franchise, the  
5 plaintiff is accordingly entitled to have its franchise reinstated, subject to a later termination  
6 consistent with applicable law. Since the PMPA requires both notice and proper grounds, it  
7 is not necessary for the Court to consider the propriety of the grounds for termination when  
8 the notice was inadequate. *Hanes v. Mid-America Petroleum, Inc.*, 577 F. Supp. 637, 647 (D.  
9 Mo. 1983).

10 23. A franchisor that has elected to terminate a franchise due to a loss of its right  
11 to grant possession must make "a bona fide offer to sell, transfer or assign" its interest in the  
12 premises to the franchisee who has requested such offer based on the franchisee's ability to  
13 gain possession of the premises with the third party landlord. 15 U.S.C. §2802(c)(4)(C)(i).

14 24. Whether a bona fide offer has been made "is measured by an objective market  
15 standard. To be objectively reasonable, an offer must 'approach [] fair market value.'" *Ellis*  
16 *v. Mobil Oil Corp.*, 969 F.2d 784, 788 (9<sup>th</sup> Cir. 1992) (quoting *Slatky v. Amoco Oil Co.*, 830  
17 F.2d 476, 485 (3<sup>rd</sup> Cir. 1987)); *Arnold v. Amoco Oil Co.*, 872 F.Supp. 1493, 1500 (W.D. Va.  
18 1995)). "The offer to buy at fair market value... assur[es] the franchisee an opportunity to  
19 continue to earn a livelihood from the property while permitting the distributor to recover the  
20 fair market value of the property sold and to end the franchise relationship." *Ellis, supra*, 969  
21 F.2d at 788. What constitutes a bona fide offer is determined on a case-by-case basis. *Id.*

22 25. In this case, the Court finds serious issues going to the merits of (1) whether  
23 Defendant's notice of termination was timely within the meaning of Section 2804 of the  
24 PMPA and (2) whether Defendant's offer to sell its equipment and improvements was in fact  
25 a *bona fide* offer within the meaning of Section 2802(c)(4)(C) of the PMPA and the case law  
26 interpreting same.

27 26. In the action at hand, Plaintiff has established the following requirements under  
28 the PMPA Section 2805(b)(2)(A) and (B) to warrant the granting of preliminary injunctive

1 relief:

- 2 a. The franchise relationship to which the Plaintiff is a party has been
- 3 terminated;
- 4 b. There exist sufficiently serious questions going to the merits to make
- 5 such questions a fair ground for litigation; and
- 6 c. On balance, the hardships imposed upon the franchisor by the issuance
- 7 of a preliminary injunctive relief will be less than the hardship which
- 8 would be imposed upon the franchisee if such preliminary injunctive
- 9 relief were not granted.

10 Good cause appearing, IT IS HEREBY ORDERED that CONOCOPHILLIPS  
 11 COMPANY, its officers, agents, servants, employees and attorneys, and all those in active  
 12 concert or participation with it (hereinafter referred to as the "Enjoined Parties") are  
 13 PRELIMINARILY ENJOINED from committing any of the following acts during the  
 14 pendency of this action:

- 15 1) Taking any further action to interfere with Plaintiff, Houtan Petroleum, Inc.'s,
- 16 use of the equipment and improvements at the Station and its operation of the
- 17 Station after assumption of immediate possession as the tenant at the premises
- 18 located at 101 E. El Camino Real, Mountain View, California 94040 upon the
- 19 termination of ConocoPhillips' right to grant possession of such premises
- 20 October 31, 2007;
- 21 2) Removing, or causing, in any manner to be removed any equipment or
- 22 improvements located at the premises located at 101 E. El Camino Real,
- 23 Mountain View, California 94040;
- 24 3) Terminating the existing franchise relationship with Plaintiff, Houtan
- 25 Petroleum, Inc., including but not limited to the delivery of motor fuel and
- 26 electronic processing of credit card sales transactions pursuant to its franchise
- 27 agreement with Plaintiff;
- 28 4) Refusing to sell and supply Plaintiff with Union 76 branded fuel in accordance

1 with the terms of the existing franchise agreement between Plaintiff and  
2 Defendant, ConocoPhillips Company.


3 The Court orders that this Preliminary Injunction is effective immediately.  
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5 Dated: \_\_\_\_\_  
6

Honorable Samuel Conti  
United States District Judge

7 Presented by:  
8

9 BLEAU / FOX, A P.L.C.

10   
11 Thomas P. Bleau, Esq.  
12 Gennady L. Lebedev, Esq.  
Attorneys for Plaintiff,  
HOUTAN PETROLEUM, INC.  
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**PROOF OF SERVICE**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is **3575 Cahuenga Boulevard West, Suite 580, Los Angeles, California 90068.**

On **November 13, 2007**, I served the documents described as:

**[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW GRANTING PLAINTIFF'S APPLICATION FOR PRELIMINARY INJUNCTION AND ORDER**

on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Clement Glynn, Esq.  
Adam Friedenberg, Esq.  
Glynn & Finley, LLP  
One Walnut Creek Center  
100 Pringle Avenue, Suite 500  
Walnut Creek, CA 94596  
Facsimile: (925) 945-1975

/X/ BY ELECTRONIC TRANSMISSION as follows: I sent such documents by e-mail to Adam Friedenberg, Esq. at **afriedenberg@glynnfinley.com.**

/X/ BY EXPRESS MAIL Via Overnight Delivery

/X/ As follows: On such date as indicated above, I deposited such envelope with an express overnight delivery service, **California Overnight**, with delivery fees paid or provided for, addressed as indicated above.

/X/ BY FACSIMILE: I sent a copy via facsimile transmission to the telefax number(s) indicated above. No error was reported by machine. I caused the machine to print a transmission record of the transmission.

Executed on this **13<sup>th</sup> day of November, 2007**, at Los Angeles, California.

/X/ (Federal) I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

  
Gennady Lebedev